

STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of:	)	Docket No. 01-AFC-4
	)	
Application for Certification for the East Altamont	)	
Energy Center	)	
_____	)	

**APPLICANT'S FINAL COMMENTS  
ON THE ERRATA TO THE  
REVISED PRESIDING MEMBER'S PROPOSED DECISION**

July 10, 2003

Greggory L. Wheatland  
Jeffery D. Harris

ELLISON, SCHNEIDER & HARRIS L.L.P.  
2015 H Street  
Sacramento, CA 95814-3109  
(916) 447-2166  
(916) 447-3512 (fax)

Attorneys for East Altamont Energy Center, LLC

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Pursuant to the Committee Order for Filing Comments, dated June 30, 2003, the East Altamont Energy Center, LLC ("Applicant") submits this reply to the comments by Commission Staff, MHCS and CARE on the Errata to the Revised Presiding Member's Proposed Decision ("RPMPD").

**I. Commission Staff**  
**A. Air Quality**

The Committee should adopt the language proposed by the Applicant for AQ-SC5, Alternative A, because that language is supported by the record in this proceeding. (Applicant's July 3, 2003 comments, pp. 8-9.)

The interpretations of the RPMPD advocated by the Staff and other parties would eviscerate the Air Quality Mitigation Agreement ("AQMA," Ex. 4G3.) executed by the Applicant and the San Joaquin Valley Unified Air Pollution Control District ("SJVUAPCD").<sup>1</sup> Staff's protestation to the contrary notwithstanding, there is a very "practical impediment" to the Staff's proposed changes. That practical impediment is that the Staff's position is absolutely contrary to the express terms of the AQMA.

Moreover, if the Committee agrees that the mitigation measures proposed must be in tons per year "*for the life of the project*," then almost certainly the Applicant will be compelled to purchase additional offsets, rather than fund the innovative programs designed to provide local air quality benefits. This result will almost certainly follow because financing the project will require the certainty associated with the purchase of ERCs, as opposed to the uncertainty of a

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<sup>1</sup> Applicant notes that the full title of the document is the "East Altamont Air Quality Mitigation Settlement Agreement," reflecting a settlement of the disagreement between Applicant and the SJVUAPCD as to whether mitigation is legally required, given the project's compliance with the BAAQMD's requirements.

complex tracking system for the life of the project. This result is not desired by the Applicant, the SJVUAPCD or the local community.

The serious disagreement between Staff and Applicant centers on Staff's insistence on adding the phrase "for the life of the project" to the local programs to be implemented pursuant to the AQMA. Staff incorrectly asserts that the phrase "for the life of the project" is supported by the record. In fact, as we explain below, this language is not supported by the record.

To begin, the AQMA does not use tons per year "for the life of the project" as the metric. Instead, the AQMA was carefully crafted to provide for the payment of a mitigation fee. The term "for the life of the project" does not appear anywhere in that document. Indeed, the term "tons per year" does not appear in the text of the AQMA. Instead, the tons per year nomenclature appears only in the attachments to the AMQA and only then as a proxy for determining the appropriate mitigation fee. More importantly, nowhere in the AQMA is the concept of "for the life of the project" reflected. The AQMA requires the payment of a one-time fee as set forth in Section 1 of the AMQA (Ex. 4G3, p.2.) There is no continuing obligation for the life of the project in the AQMA, the seminal document for the Committee's consideration. Thus, the record supports the Applicant's proposed revisions to AQ-SC5. Even if the Commission were to require the payment of additional mitigation funds to ensure that the reductions achieved by the AQMA achieve 66.8 tons/year (a provision that is reflected in Alternative A of our supplemental RPMPD comments), there is nothing in the AQMA that would extend this commitment to "the life of the project".

Further, Staff suggests that the additional mitigation it seeks for the life of the project is necessary to address an impact that the SJVUAPCD has "identified." (Staff's July 3, 2003 comments, p.1.) Clearly, the SJVUAPCD does not believe that the additional mitigation

proposed by Staff is necessary to meet the District's concerns. The SJVUAPCD is more than satisfied that the AQMA address all of its concerns:

The District believes that the types of mitigation measures it will implement under this agreement – measures such as the replacement of agricultural pumps and heavy duty engines – will provide emission reductions that are sufficient to mitigate EAEC's impacts for the life of the project.

\* \* \*

The value of the mitigation agreement with EAEC will provide reductions in NOx emissions that will meet or exceed the required quantity of 66.8 tons per year and will do so without requiring additional funding. (SJVUAPCD Comments on the PMPD, dated July 1, 2003, pp 1-2.)

Having relied on the District's initial judgment regarding potential impacts, the Staff cannot now ignore the SJVUAPCD's conclusion that the AQMA as executed by the District and the Applicant provides benefits by reducing emissions over the life of the project.

Staff further suggests that the offset calculations in the Draft Consensus Air Quality Mitigation Plan (Ex. 2CC) are calculated in tons per year. This is correct. However, the Staff then takes an illogical leap when it argues that the calculations were "understood" to be tons per year "for the life of the project." This is absolutely incorrect. The calculations in the Draft Consensus Plan were calculated on a tons per year basis; however, the calculations and the associated text indicate some of those projects have more limited lives. For example, the natural gas transit buses and school buses included in the Draft Consensus Plan at Staff's suggestion include express disclaimers that the buses were expected to have 15 years of service, and the reductions are calculated on an annual (tons/year) basis for that 15 year period. (Ex. 2CC, p. 2.)

The Committee obviously values consistency in its decisions, both internal consistency within a single decision and consistency throughout all of its decisions for different projects. Unfortunately, the CEC Staff's position in this matter is, once again, completely at odds with the Staff's position in the Otay Mesa proceeding, where a similar request for PM<sub>10</sub> mitigation was

made. As EAEC has noted in previous filings, in the Otay Mesa proceeding, neither the CEC Staff nor the Commission sought the imposition of the detailed monitoring and reporting requirements requested by the CEC Staff, and imposed by the Committee, in this proceeding. More to the point, in the Otay Mesa proceeding the CEC Staff advocated the use of mitigation fees paid by OMGC for the one-time purchase of low-emitting school buses – a mitigation program that cannot last the life of the Otay Mesa project (unless someone has recently designed a 30-year school bus). The CEC Staff in the EAEC proceeding continues to attempt to create new and unique requirements without regard to the expertise of the air pollution control agencies in the area. The CEC Staff has made no secret of their disdain for air pollution control districts in general, and of the San Joaquin Valley APCD in particular. The Committee should send a clear message through its PMPD on this point.

The language proposed by the Applicant for AQ-SC5 not only preserves the agreement between the SJVUAPCD and the Applicant, it also provides the localized air quality benefits the Committee seeks to confer. While the Applicant values the option of being able to simply purchase additional ERCs to satisfy the requirements of AQ-SC5, the Applicant also values the localized air quality benefits that will be produced from the AQMA programs. Accordingly, the Committee should avoid forcing the nullification of the AQMA and instead, adopt the Applicant's proposed revisions to AQ-SC5, Alternative A set forth in the Applicant's July 3, 2003 comments on the Revised PMPD.

## **II. MHCSO**

The letter from the MHCSO simply restates its "position that it is the only available provider of treated wastewater." At the same time MHCSO states that it supports the comments of the Staff on the errata to the RPMPD. The Staff states that the Energy Commission is not the "proper forum in which to settle the legal debate" over who will provide recycled water to the

EAEC. Thus, it seems that MHCSD and Commission Staff agree that the Commission need not decide who will provide recycled water to the project.

### **III. CARE**

CARE raises two issues in its comments on the errata. First, CARE alleges that the Commission is required by Sections 15072 and 15087 of the CEQA regulations to provide a noticed hearing on the PMPD and RPMPD. However, these regulations apply to the preparation of negative declarations and environmental impact reports. The power plant site certification program of the State Energy Resources Conservation and Development Commission under Chapter 6 of the Warren-Alquist Act, commencing with Public Resources Code Section 25500, has been certified by the Secretary for Resources as meeting the requirements of Public Resources Code Section 21080.5. (14 Cal. Code of Regs §15251(k)) Therefore, the CEC siting process is exempt from the requirements for preparing EIRs and Negative Declarations, and exempt from the CEQA regulations cited by CARE. (14 Cal. Code of Regs. §15250)

Second, CARE argues that the record in this case is sufficient to require the EAEC to use dry cooling; yet, in the manner that is typical of CARE's participation in this proceeding, CARE fails to offer a single citation to the record in support of this contention. Instead, CARE offers a new discourse on prions and airborne pathogens, none of which is in record. Although CARE is an active party in this proceeding and had a full opportunity to offer testimony, none of the information contained in CARE's comments on the errata was offered into evidence. The RPMPD has responded to all issues raised by the parties in a timely manner in this proceeding, and has no duty to respond to issues that are raised after the close of the evidentiary record.

Finally, the California Department of Health Services recently updated its Title 22 regulations regarding the use of reclaimed water for Cooling Towers. (22 Cal.Code of Regs § 60306) The updated regulations revised the methods of ensuring that water is disinfected. The

MOU between the Applicant and BBID provides that all reclaimed water must meet Title 22 standards and EAEC must comply with Title 22 requirements on site. (Ex 8L; RPMPD, p. 367) Therefore, contrary to CARE's speculative assertions, the public health impacts of reclaimed water use have been expressly addressed by State regulations and the Project Owner will be required to conform to these regulations.

Respectfully submitted,

Dated: July 10, 2003

ELLISON, SCHNEIDER & HARRIS L.L.P.

By \_\_\_\_\_

Greggory L. Wheatland, Esq.  
Jeffery D. Harris, Esq.

Attorneys for East Altamont Energy Center, LLC

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**PROOF OF SERVICE**

I, Deric Wittenborn, declare that on July 10, 2003, I deposited copies of the attached *Applicant's Final Comments on the Errata to the Revised Presiding Member's Proposed Decision* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
Deric Wittenborn

## **SERVICE LIST**

### **01-AFC-4**

Richard L. Thomas, Senior Vice President  
4160 Dublin Blvd.  
Dublin, CA 94568

Ms. Alicia Torre, Project Manager  
East Altamont Energy Center, LLC  
4160 Dublin Blvd.  
Dublin, CA 94568

Steve DeYoung  
Calpine  
4160 Dublin Blvd.  
Dublin, CA 94568

Susan Strachan  
Calpine  
Post Office Box 1049  
Davis, CA 95617-1049

SJVUAPCD  
c/o Seyed Sadredin  
Director of Permit Services  
1990 East Gettysburg Ave.  
Fresno, CA 93726-0244

CURE  
c/o Marc D. Joseph, Esq.  
Adams Broadwell Joseph & Cardozo  
651 Gateway Blvd., Suite 900  
So. San Francisco, CA 94080

Robert Sarvey  
501 W. Grantline Road  
Tracy, CA 95376

California Regional Water Quality Control Board  
Central Valley Region  
3443 Routier Road, Suite A  
Sacramento, CA 95827

California Department of Water Resources  
Project Power Planning Branch  
State Water Project Analysis Office  
Michael Werner  
1416 9th Street  
Sacramento, CA 95814

US Department of Commerce  
National Marine Fisheries Service  
Rebecca Lent, Ph.D.  
501 West Ocean Boulevard, Suite 4200  
Long Beach, CA 90802-4213

Al Ghaffari  
Stationary Source Division  
California Air Resources Board  
1001 I Street, 6th Floor  
Sacramento, CA 95812

Bruce Thomas  
Western Area Power Administration  
114 Parkshore Drive  
Folsom, CA 95630-4710

Lois M. Sahyoun  
Clerk of the Board  
San Joaquin County Board of Supervisors  
222 East Weber Avenue, Room 701  
Stockton, CA 95202

Californians for Renewable Energy, Inc.  
c/o Michael Boyd  
5439 Soquel Drive  
Soquel, CA 95073

Dave Swanson  
Western Area Power Admin., A7400  
12155 West Alameda Parkway  
Lakewood, CO 80228